Price participation was indeed minimum, with such safety inspection, execution of documents, etc., as was done being performed on many occasions by personnel of Damion's Service Station. With respect to the substance of the regulations, under the conditions which obtained it is difficult to credit Great Coastal with a belief that it was in fact transferring dominion and control of the equipment, drivers and lading to Price. Inasmuch as Great Coastal is chargeable with a knowledge and understanding of the purpose and intent of the leasing regulations, as well as their technical requirements, the examiner is constrained to conclude that Great Coastal in its conduct of the lease operation with Price has shown a disregard for the laws and regulations administered by the Commission, for which it deserves consure.[45]

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[45] As it will appear, the examiner's recommendation for the disposition of this proceeding does not turn on the existence or nonexistence during a particular period of time of violations of law and regulations on the part of Great Coastal or Price in their conduct of the lease operation, and no finding of violation is reached. In this connection, a finding of violation would have to be supported by findings of fact describing the actions of the parties during a particular time period. Here the parties were engaged in different actions at different times. Viewed at a particular time it could be concluded that the arrangement was being used as a device to lease Price's operating rights, but viewed from beginning to end the conclusion is not sustained. It is not contended that the arrangement was unlawful *ab initio*, including the period immediately after commencement when Price furnished tractors and drivers (except that witness Nielsen testified that from the beginning Damion's Service Station was the interchange site—contradicted by witness Estes). While it appears that there were violations of specific provisions of the leasing regulations during the period of minimum participation by Price, the record contains no detailed proof or admission of this (apart from location of the interchange site and absence for a short period of a tariff, as to which there are mitigating circumstances). Some recognition must be given to the corrective action taken in conjunction with a review of the operation by District employees of the Commission.

The examiner is not unmindful that there were a number of unusual factual circumstances present, including the loss by Price of all its equipment and employees (other than Nielsen) after the interchange was commenced. Such circumstances, however, do not justify yielding to expediency, and disregard for Commission regulations is not to be condoned. On the other hand, the record shows that conferences were held with District employees of the Commission concerning the interchange operation. The record further shows that following such a conference, on or about mid-April 1963, corrective action was taken by Great Coastal and Price to give effect to specific suggestions made, which it can be assumed were designed to bring the parties into compliance with applicable regulations. The examiner takes official notice that no enforcement action of record has been taken by the Commission against Great Coastal involving alleged violations of any of the rules and regulations promulgated by the Commission. No finding of violations is reached in the present proceeding (see footnote 45). Accordingly, no bar to approval of the transaction by reason of lack of fitness of the vendee is found.

Service Considerations. Applicants urge an affirmative answer to the third question they have suggested, "Have the Price rights been exercised actively so that the establishment of a single-line service by Great Coastal would not be tantamount to a new service?" In support they contend that Price has continuously and actively utilized its rights to effect the transportation of freight in interline service, not only with Great Coastal but also with other carriers; that acquisition of the Price operating rights by Great Coastal would result in a mere substitution of service; that unification of the Price operating rights with those now held by Great Coastal would result in a new service "only to the extent that there would be eliminated the necessity for interchange of shipments and equipment," which is not sufficient to warrant a conclusion that a new service would be enabled by the trans-

action; and that there has been shown no potentiality of a harmful adverse effect upon the protestants, all of whom are substantial carriers well-established in their respective territories (citations omitted).

Protestants assert that the certificated rights of Price have become substantially dormant and that the evidence of shipments transported submitted for Price fails to show more than inconsequential use of them. They assert that neither Price nor Great Coastal has participated in traffic moving between Great Coastal's authorized territory and the Norfolk area with any competitive impact, either by interline connection with each other or with other carriers, and that acquisition of the Price operating rights by Great Coastal would definitely result in a new and different service. With respect to such new and different service, they assert that applicants have failed to show any public need for extension of Great Coastal's operations into the Norfolk area or that the motor common carrier services now being provided in the Norfolk area would result in substantial diversion of traffic from protestants and would materially adversely affect their operations and services. The examiner concludes that protestants' contentions are for the most part supported by the weight of the evidence.

a. Alleged dormancy.

Vendor's operations under its certificated rights have been examined above. As stated in applicant's brief, Price's participation in interstate shipments has been dependent upon the willingness of other carriers to do business with it. More accurately, Price's participation in interstate shipments for the period covered by its abstract of shipments, September 1961 through May 1963, has been dependent upon the willingness of other carriers to give business to Price, for it does not appear that Price generated any of the approximately 1,353 shipments shown, 1,306 of which were inbound.

Excluding for the moment the 866 inbound shipments shown as received from Price and Morton, protestants assert that substantially all the remaining 440 inbound shipments were received in Norfolk for delivery within the commercial zone and terminal area of Norfolk and most of these were not true interline shipments. The 215 shipments received from Springmeier were not interline shipments but instead were shipments delivered by Price as cartage agent for a freight forwarder. Likewise the 20 shipments listed as being received from the Norfolk & Western Railway were not interline shipments but were freight cars from which Price made deliveries under contract with the meat-packer shipper. The 180 shipments given to Price by Turner's Express between September 30 and October 3, 1961, during a strike of the latter's teamster employees, were turned over to Price in Norfolk for delivery mostly in the Norfolk commercial zone on a per-hundred weight basis, and as such cannot be considered as true interline shipments. In sum, protestants contend, under the circumstances of receipt the transportation of most of the above shipments was performed under the commercial zone and terminal area exemptions of the act, and not under Price's certificated operating rights.[46] With

[46] On brief, counsel for Turner's Express contends that all shipments handled by Price which could be performed without certificated authority are properly excludable from consideration because Price could continue to perform such transportation even after sale of its operating rights to another carrier, and the Commission has consistently held that it will not permit a vendor to transfer rights where the traffic will be retained. Citing *Shoe City Exp. Co., Inc.—Purchase—Marshall,* 45 M.C.C. 778; *Ballard & Skellet Van Lines, Inc.—Consolidation,* 58 M.C.C. 539, and *Arkansas Exp., Inc.—Purchase—Patterson Transfer Co.,* 56 M.C.C. 460. In the present case, Price's condition would appear to exclude any possibility that it would be able to continue any operations within the Norfolk commercial zone and terminal area after sale of its certificated operating rights. But the principle is nevertheless applicable.

respect to the remaining shipments, admittedly the evidence does show that on a number of occasions Price did participate in true interline shipments with other carriers, destined to representative points within its territory, but protestants contend that the volume of such service cannot be regarded as substantial.

With respect to the approximately 700 shipments shown as received by Price from Great Coastal in the period between April 1962 and May 1963, protestants assert that for purposes of determining past utilization of vendor's rights little or no credit should be given to Price for these shipments, for three principal reasons: First, although a carrier is entitled to build up its operations, even in anticipation of sale of its operating rights, where this is done principally through the aid and assistance and under the control, dominion, or influence of the prospective vendee, the shipments involved are entitled to little weight in negating dormancy. See *Aero Trucking, Inc.—Pur. (Portion)—Kreitz,* 93 M.C.C. 115; *Dallas & Mavis Forwarding Co., Inc.—Pur.—Billy Baker Co.,* 87 M.C.C. 527; *Cooper M. Lines, Inc.—Purchase—Parrish Dray Line, Inc.,* 58 M.C.C. 283; *Deaton Truck Line, Inc.—Pur.—Magnolia Truck Line,* 87 M.C.C. 674; *Pilot Freight Carriers, Inc.—Pur.—Bison Fast Freight,* 90 M.C.C. 709; and others. Here, the movement of the traffic, all generated by Great Coastal, started after the Price rights were available for purchase and only a few months before purchase negotiations with Great Coastal admittedly began; the through-movement of the traffic was from the beginning subject to the control, dominion or influence of Great Coastal; and the movement began and was continued under circumstances which make it reasonable to believe that the parties formed an early intention of purchase of the rights by Great Coastal. Second, it is well established that shipments handled in an unlawful manner may not be given any weight in support of applicant's position. *Vance Trucking Co., Inc.—Pur.—Northern Neck Transfer,* 87

M.C.C. 545; *Stewart—Investigation of Control,* 87 M.C.C. 681; *Pilot Freight Carriers, Inc.—Pur.—Bison Fast Freight, supra.* Here, according to the testimony of witness Nielsen, all the traffic was interchanged at an unauthorized point, namely, Damion's Service Station. For a period no tariff was on file. But more importantly, commencing with the time that Price no longer could furnish tractors or drivers, the Price participation was so minimum that it must be considered that the rights of Price were being unlawfully leased and operated by Great Coastal. Inasmuch as the Price-Morton arrangements were very similar to the Price-Great Coastal arrangements, nearly all the shipments being transported after Price no longer had any equipment or drivers, this principle is applicable as well to the 186 shipments shown on the abstract as received from Morton. And third, in any event, the volume and nature of this traffic is such that at best it reflects but a very limited utilization of Price's operating rights. Starting in August 1962 the volume of traffic handled through the Price-Great Coastal arrangement averaged only about one trailer-load per week day and, except for 13 truckload shipments in 1963, consisted entirely of the C.V.S.A.-consolidated shipments inbound to a cartage agent in Norfolk. Stated differently, since August 1962 the Price-Great Coastal interchange traffic has consisted, for all practical purposes, of about one trailer-load per week day transported for one shipper in one direction and delivered to only one point in Price's territory. Likewise, the shipments received from Morton were infrequent trailer-loads of inbound shipments transported in one direction and delivered to only one point in Price's territory, namely, a cartage agent in Norfolk. After mid-September 1962 (except for four shipments in November 1962), the only shipments transported under Price's operating rights were those shown as received from Morton and Great Coastal.

The examiner does not reach the conclusion that the operating rights of Price are dormant, or substantially

dormant, as this term has been applied by the Commission in proceedings under section 5 involving the disposition of irregular route authority.[47] In the present case the record shows that upon assuming management of Price in February 1961, Nielsen sought to expand its operations as best he could under the circumstances, taking such steps as causing Price to become a member of the Middle Atlantic Conference tariff and soliciting interline business from other carriers. It is not contended that Nielsen abandoned his efforts to obtain business for Price, at least not until the time (December 1962, after negotiations for sale of Price's operating rights to Great Coastal had been completed) that Price no longer had available any equipment, terminal, office, or other employees, by reason of its financial difficulties. So far as obtaining interstate business is concerned, involving participation in interline shipments with other motor carriers, it must be concluded that Nielsen was not very successful. Of the 1,353 shipments listed on Price's abstract of shipments covering the period September 1961 through May 1963, only 463 were received from carriers other than Great Coastal and Morton. Of the latter, the examiner agrees that the shipments shown as received from Springmeier and the Norfolk & Western Railway and most of those received from Turner's Express are to be excluded from consideration in determining past utilization of Price's certificated rights, for the reasons advanced. With respect to the 890 shipments received from Great Coastal and Morton, the examiner appreciates the cogency of the arguments made. However, the record will not support findings that Great Coastal became the prospective vendee of the Price rights until November 1962; that Price came under the dominion, control or influ-

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[47] See *New Dixie Lines, Inc.—Control—Jocie Motor Lines, Inc.*, 75 M.C.C. 659, 666. Also, *U.S.* v. *Caroline Freight Carriers Corp.*, 315 U.S. 475; *Branch Motor Exp. Co.—Control—Morgan Trucking Co.*, 93 M.C.C. 244; *Central Wisconsin M. Transport Co.—Purchase—Carlstedt*, 85 M.C.C. 305.

ence of Great Coastal until about this time; that the interchange arrangement was unlawful *ab initio;* or that all shipments after Price no longer could furnish equipment or drivers were handled in an unlawful manner (apart from certain technical violations of applicable regulations, as to which there are mitigating circumstances). Accordingly, Price is credited with a large number of the shipments shown as interlined with Great Coastal and Morton.[48] These together with the other interline shipments in which Price admittedly did participate, serving representative points within its territory, are sufficient to preclude a finding that Price's operating rights are dormant. At the same time, however, the examiner agrees that the volume and nature of service rendered by Price in recent months reflect but a very limited utilization of its certificated rights.

b. New service.

The record does not show any participation by Price, previous to establishment of the connecting-line arrangement with Great Coastal, in traffic moving between the Norfolk area and Great Coastal's authorized points of service. Likewise, the record does not show that Great Coastal participated to any substantial extent, previous to establishment of the connecting-line arrangement with Price, in traffic moving between Great Coastal's authorized points of service and the Norfolk area. Stated differently, neither Price nor Great Coastal had been a competitive factor in traffic moving between their respective territories. Thus, the Great Coastal-Price interline movement of traffic which began in April 1962, as described herein, was a new competitive service which had not theretofore been faced by existing common carriers providing either single-line or connecting-line service to the Norfolk area from

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[48] See *Midwest Transfer Co. of Ill.—Control—Chamberland's,* 90 M.C.C. 503, 508.

the points which Great Coastal is also authorized to serve. As described above, however, the volume of this new competitive service has not been large; further, it has been very limited in nature, consisting largely of shipments transported for one shipper in one direction. If approval of the proposed transaction would have only the effect of allowing Great Coastal to continue moving traffic into Norfolk of this nature and volume, it is unlikely that the application would be so vigorously opposed by so many protestants.

In contending that the acquisition of the Price operating rights would be a provident transaction, Great Coastal refrained from anticipating that it would develop any large volume of traffic between its present authorized territory and the Norfolk area. In the discussion of the purchase price, however, the examiner concluded that once Great Coastal is established in Norfolk, as it now is in Richmond, it can be assumed that it would soon be deriving substantial revenues from transportation services between its northern points, including such major points as New York City, Northern New Jersey, Philadelphia, and Baltimore on the one hand, and, on the other, points in the Norfolk area. Great Coastal is now transporting a heavy volume of traffic between such northern points and Richmond and there is no reason to believe that it will not develop a substantial volume of traffic into and out of the Norfolk area. Because it has not participated in traffic moving between its present authorized points and the Norfolk area, to any appreciable extent, it is held that approval of the proposed transaction would result in a new and additional competitive service (as opposed to mere substitution of service or improvement of an existing service). The result would not be distinguishable in substance from the result of an extension of Great Coastal's service into the Norfolk area through securing new operating authority.

c. Need for and effect of new service.

Where approval of an acquisition would result in the institution of a new and additional competitive service by the vendee, the ultimate issue for consideration in determining consistency with the public interest[49] is whether benefits accruing to the public would outweigh possible harmful effects upon the carriers serving the area involved.[50] Factual issues are the adequacy or inadequacy of existing transportation services, the need for new and additional service, and whether the new and additional competitive service would adversely affect to any substantial degree the continuance, efficiency and economy of existing carrier services.

Consistent with applicant's position on brief that acquisition of the Price operating rights by Great Coastal would result only in a mere substitution of service and unification would result in a new service "only to the extent that there would be eliminated the necessity for interchange of shipments and equipment," the evidence submitted by appli-

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[49] Consistency with the public interest "has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision for and best use of transportation facilities." *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25. "Such a concept obviously embraces the interest of competing carriers as well as that of shippers and consignees." *Pacific Intermountain Exp. Co.—Control and Purchase*, 57 M.C.C. 467, 470; *Shein's Exp.—Purchase—Central Jersey Motor Lines, Inc.*, 59 M.C.C. 534.

[50] *Bowman Transp., Inc.—Control and Merger*, 93 M.C.C. 133; *Barber Transp. Co.—Purchase—Conner*, 90 M.C.C. 475; *Bowman Transp., Inc.—Purchase—A. W. Hawkins, Inc.*, 90 M.C.C. 303; *Deaton Truck Line, Inc.—Pur.—Magnolia Truck Line, supra; Boyd E. Richner, Inc.—Purchase—Rust*, 87 M.C.C. 205; *Consolidated Freightways, Inc.—Control—Silver Fleet*, 85 M.C.C. 139; *Interstate Motor Freight System—Control—Moskowitz*, 75 M.C.C. 607.

cants to show public need was quite limited. It consisted of testimony of two Norfolk members of the C.V.S.A. and an employee on Montgomery Ward & Co., examined above under the heading "Consignee Support." The latter witness expressed a desire to receive overnight service on infrequent shipments from the New York City area, which he stated was not being received, but he was not acquainted with present or feasible transit times with respect to less-than-truckload shipments, and his testimony has no probative value. The two C.V.S.A. members expressed satisfaction with the consistent overnight service being received from the Great Coastal-Price combination with respect to the C.V.S.A. consolidated shipments from New York and Philadelphia, but it cannot be inferred from their testimony that existing carriers serving Norfolk are not ready, willing and able to provide equally good service. No evidence was offered by applicants to the effect that existing transportation services in the Norfolk area are inadequate or unsatisfactory or that existing carriers are not equipped to handle all available traffic efficiently and economically. Should the present application be denied, it is not likely that the public would be deprived of the limited services performed during recent months under Price's operating rights, for it can be assumed that arrangements would be made for their continued performance. It is concluded that applicants have not made a sufficient showing that benefits would accrue to the public from approval of the proposed transaction.

Under the heading "Protestants," the evidence of the opposing carriers was briefly reviewed. In sum, such evidence shows that all of them are substantial, established motor carriers which have invested considerable money in equipment and facilities to enable them to provide adequate, safe, efficient and economical transportation services to the public as authorized by the Commission. Based on the record, and in the absence of evidence to the contrary,

the examiner will conclude that individually and collectively they are providing adequate service to shippers and consignees in their respective areas of operation, that they desire and are equipped to handle additional business, and that any substantial loss of traffic would materially and adversely affect the continuance, efficiency and economy of their existing carrier services to the detriment of the public. All of them introduced evidence showing that the new and additional service which approval of the proposed transaction would enable Great Coastal to provide would be competitive with their present services; and most of them submitted specific evidence as to the amounts of their traffic which would be susceptible to diversion by Great Coastal. The amount of traffic vendee would divert from the opposing carriers is problematical and not subject to exact determination, but with no new sources of traffic shown to be available it can only be concluded that it would be substantial. The examiner finds that extension of Great Coastal's operations into the Norfolk area would disrupt the competitive balance with harmful effect on competing carriers and would not foster sound economic conditions in the industry.

It is concluded that the unfavorable impact upon existing motor carriers and the public is not outweighed by any benefits which would accrue to the public.

The examiner has fully considered the various contentions and requested findings of the parties and, except to the extent indicated, finds that they should not alter the ultimate findings and order herein.

Ultimate Findings and Order

The examiner finds that the purchase by Great Coastal Express, Incorporated, of the operating rights of Price Transfer Company, Inc., and the acquisition by C. E. Estes of control of such rights through the purchase have

not been shown to be consistent with the public interest and the application, accordingly, should be denied.[51]

Premises considered, it is the ORDER of the examiner that:

The application be, and it is hereby, denied.

This order shall become effective on the date of service of a notice or order stating that this recommended order has become the order of the Commission.

Ninety days from the effective date of this order, the order entered June 13, 1963, as extended by order entered November 13, 1963, authorizing the lease by Great Coastal Express, Incorporated, of the operating rights of Price Transfer Company, Inc., shall be of no further force or effect.

By the Commission, Louis W. Sornson, Hearing Examiner.

Dated at Washington, D. C., this 2nd day of March, A.D. 1964.

HAROLD D. McCOY
Secretary

(SEAL)

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[51] Consideration has been given to approval of the acquisition by Great Coastal of the Price operating rights subject to a restriction against joinder or tacking, i.e., a restriction which would preclude single-carrier through-service by Great Coastal between any of the points named in the Price operating rights, on the one hand, and, on the other, any of the points or places specified in the other operating rights possessed by Great Coastal. However, this would defeat the purpose of the application as presented to the Commission, and no showing was made that approval of the transaction subject to such a restriction would be consistent with the public interest. Accordingly, the examiner finds that the application should be denied, even were approval of the transaction to be subject to a restriction of the nature described.

APPENDIX D

SERVICE DATE
December 18, 1964

Decision and Order

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 14th day of December, A.D. 1964.

No. MC-F 8338

GREAT COASTAL EXPRESS, INCORPORATED—PURCHASE—
PRICE TRANSFER COMPANY, INC.

Upon consideration of the application and the record in the above-entitled proceeding, including the report and order of the hearing examiner, served April 3, 1964, the exceptions thereto filed by the applicants and by protestant, Adley Corporation, doing business as Adley Express Company, and the replies of the applicants, Adley, and Turner's Express, Inc., protestants, and

It appearing, That the findings and conclusions of the hearing examiner with respect to all matters of fact and law considered and disposed of in his report are, in all material respects, proper and correct; and that the exceptions of the parties and the replies thereto raise no new or material matters of fact or law not adequately considered and properly disposed of by the hearing examiner in his report; and that the exceptions and replies are otherwise not of such nature as to require the issuance of a report by Division 3 discussing the evidence in light of such pleadings;

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in the light of the exceptions and the replies thereto does not warrant a different result from that rendered by the hearing examiner; that the statement of facts and conclusions and the

findings of the hearing examiner, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own:

It is ordered, That the order of the hearing examiner served April 3, 1964, recommending denial of the application, be, and it is hereby, adopted as the order of the Commission, Division 3, effective 20 days from the date of service hereof.

By the Commission, Division 3.

HAROLD D. McCOY
Secretary

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